POLICE DEPARTMENT CITY OF NEW YORK

December 15, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Robert Miceli
Tax Registry No. 950886
44 Precinct
Disciplinary Case No. 2014-12476

Charges and Specifications:

1. Said officer Robert Miceli, on or about April 28, 2013, at approximately 1842 hours while assigned to the 44th precinct and on duty in the vicinity of [redacted], Bronx County, did wrongfully use force against Christopher Hatfield, in that he struck Mr. Hatfield about the head while Mr. Hatfield was handcuffed.

P.G. 203-11, Page 1, Paragraph 2 – USE OF FORCE

Appearances:

For the CCRB-APU: Raasheja N. Page, Esq.
For Respondent: John P. Tynan, Esq.

Dates of Hearing:

July 17 and October 30, 2015

Decision:

Guilty

Trial Commissioner:

ADCT David S. Weisel

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the tribunal on July 17 and October 30, 2015. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Civilian Complaint Review Board called Christopher Hatfield as a witness and presented the CCRB interview of now-retired Lieutenant Person A Respondent called Police Officer Alban Kalaj as a witness and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, Respondent is found Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The complainant in this case, Christopher Hatfield, was arrested at approximately 1845 hours on April 28, 2013, in front of [redacted] in the Bronx. Respondent, who was assigned to a shooting-reduction foot post in the 44 Precinct on that date, is charged with wrongfully using force by striking Hatfield in the head while he was handcuffed.

The accounts of the case varied significantly. Hatfield stated that he was waiting for a cab with some of his friends, sitting on the hood of a car. Three officers, two male and one female, approached. One of them was Respondent. The other male officer was Police Officer Alban Kalaj. The three officers told Hatfield to place his hands behind his back. When he asked what he was being arrested for, the two male officers grabbed him and slammed him on the car and the concrete ground. This caused Hatfield to suffer a bloody lip, so much blood that he could not swallow it. One of the officers began beating him and he was handcuffed. He denied resisting, but admitted that the officers were unable to handcuff him on the hood of the car,

leading them to throw him to the ground (Tr. 12-17, 20, 22, 28-32; CCRB Ex. 2, photograph of injury to lip).

On the way to the police SUV, Hatfield spit out some of the blood onto the floor, but denied spitting at any police officer. Hatfield testified that Respondent placed him in the vehicle. Hatfield entered from the passenger side and slid over to the driver side. Respondent came in after and sat on the passenger side. Hatfield, Respondent, and the driver, who was wearing a white uniform, were the only people in the vehicle. It did not have a partition (Tr. 16-20, 33-36, 38, 52-53).

Hatfield stated that Respondent kept hitting him, even though he was in handcuffs, all the way to the precinct. Respondent hit him in the head and the ribs, causing scratches to his ear. He said that this went on for several minutes. Hatfield was taken from the station house to Lincoln Hospital for treatment (Tr. 16, 18-23, 35-37, 52; CCRB Ex. 3, photograph of injury to ear).

Hatfield admitted that after being arraigned on his arrest, he was sent to Rikers Island for about a week because of a prior missed community service sentence. He also was convicted of disorderly conduct as a result of the April 2013 incident. He denied giving a false name to the officers, though at his CCRB interview he stated that he was charged with false personation because "I gave them a wrong name." He denied being a member of any gang (Tr. 24, 26-28, 39-41).

Lieutenant Person A was the driver of the SUV, but he retired soon after the trial had begun. A notification was made for him to appear, but he had transferred to another command and the appearance had to be cancelled. Before he could be rescheduled to testify, he retired. The parties agreed that his CCRB statement (CCRB Ex. 4) would be admitted as evidence.

Person A contacted the Internal Affairs Bureau after seeing the interaction between Hatfield and Respondent in the back of the SUV. This later was referred to the CCRB for investigation (CCRB Ex. 4, p. 6).

Person A stated to the CCRB that he was assigned to the shooting-reduction post. He was notified by Respondent to respond to [redacted] and arrived to find three of his officers, including Respondent, with Hatfield under arrest. Hatfield was not compliant and had a bloody lip. He was denying that he had a warrant. Respondent placed Hatfield inside Person A's vehicle on the passenger side. The vehicle did not have a partition. The lieutenant observed Hatfield "do like a steady motion towards the direction of" Respondent, although he "did not see spit come out of the mouth." Respondent came around to the driver side of the car and got in behind Person A. Respondent closed the door and said, in sum and substance, "[H]e spit on me or don't spit on me[,] something about spitting." Person A observed Respondent punch Hatfield three to four times in the head. Person A rebuked him, saying, "[N]o, listen, just hold him and let's get the fuck out of here" (Ex. 4, pp. 3-4, 6-7, 9-13, 16-17).

At the precinct, Person A said, he confirmed with Respondent that Hatfield had two warrants and was a known gang member. In fact, Hatfield told his mother when she arrived that he had resolved the warrant. Person A knew that this was untrue by checking the computer database and told Hatfield to "be a man and admit it." Hatfield then admitted to his mother that he had not resolved the warrant (Tr. 7-8, 20-21).

Person A nonetheless was upset about Respondent hitting a handcuffed prisoner and admonished Respondent, saying, "[W]hat are you thinking, what are you doing?" Person A then notified IAB about the matter and called an ambulance on Hatfield's behalf, although the prisoner had not requested it (Ex. 4, pp. 7-8, 21-22).

Kalaj and Respondent testified on behalf of Respondent's case. According to Kalaj, the two officers and a female officer were assigned to the shooting-reduction foot post mentioned by Person A. Kalaj observed Hatfield, whom he described as a known gang member within the 44 Precinct. This individual had active warrants, information that also had been disseminated at roll call. Kalaj admitted that he was unsure when he received the flyer with Hatfield's picture on it. He did not recall what the warrants were for (Tr. 72-75, 82-84, 91, 101-02, 105, 113-14, 119).

As the officers walked past Hatfield, Kalaj thought about it and recognized Hatfield. He let his partners know and everyone turned around. Kalaj stated that he asked Hatfield for identification. When he gave the name "Jorian Gomez," Kalaj realized that he was lying. He told Hatfield that he was under arrest for false personation and to put his hands behind his back. Hatfield resisted, grabbing his pants and locking his arms, and refusing to let the officers handcuff him. There was a brief struggle and everyone fell to the ground together. Hatfield was handcuffed and Respondent held onto him (Tr. 75-80, 83-84, 86-89, 98, 101, 106-08, 114-15).

Hatfield's lip was bleeding after he was stood up from the ground. A few minutes later, a vehicle arrived to transport Hatfield to the precinct. Kalaj was the arresting officer but Respondent did the transport. As Kalaj and Respondent escorted Hatfield to the passenger side of the vehicle, Hatfield spit on them. Kalaj said that the spit contained blood. Kalaj conceded that he did not get an exposure number, but said this was because the spit only landed on his shirt. Respondent said that the spit landed on his glasses. He had to go to the hospital for an injury to his hand and asked the nurses about the spitting. They told him to wash his eyes thoroughly with water, which was what he did. Respondent did not get an exposure number and did not recall why not (Tr. 80-81, 90, 96, 98, 102-03, 109-10, 115-19, 124-25).

Respondent testified that he entered the vehicle from the passenger side. Person A and a fourth police officer were in the vehicle as well. Hatfield began kicking the driver side back

door, and Respondent held onto him to restrain him. He denied punching him (Tr. 110-12, 116, 120-21).

Hatfield did not complain of any injuries at the desk. Kalaj said that the complaint report he filled out (CCRB Ex. 6) stated "No" for whether the incident was gang-related, as the incident was not gang-related. He admitted, however, that he listed "No" for gang affiliation on the pedigree portion of Hatfield's arrest report (CCRB Ex. 7). He contended that this was a mere clerical error (Tr. 82, 93-94, 97, 99-100, 102).

The issue to be determined in this case is whether or not Respondent wrongfully used force by striking Hatfield in the head while he was handcuffed. The tribunal finds that the CCRB proved by a preponderance of the credible evidence that Respondent engaged in the alleged misconduct.

Resolution of this matter rests in large part on a determination of witness credibility. In analyzing credibility, this tribunal may consider such factors as consistency of testimony, supporting or corroborating evidence, motivation, bias or prejudice, and the degree to which an account comports with common sense and human experience.

The Court credits Hatfield and Person A on the issue of whether Respondent struck Hatfield in the head. Person A's hearsay statement to the CCRB was the most powerful evidence of Respondent's guilt. Hearsay is admissible in this forum if it is sufficiently relevant and probative. See People ex rel. Vega v. Smith, 66 N.Y.2d 130, 139 (1985); Matter of Grossman v. Kralik, 217 A.D.2d 625, 626 (2d Dept. 1995); cf. Matter of Andruszkiewicz v. Doherty, 84 A.D.3d 595 (1st Dept. 2011) (hearsay testimony of Sanitation Department investigator, who obtained statement from woman that tipped employee for accepting trade waste, was sufficiently relevant and probative to demonstrate that employee accepted the gratuity). This is especially true when the hearsay is coupled with testimony from witnesses with personal knowledge of the

material facts. Matter of Smith v. New York City Dept. of Educ., 109 A.D.3d 701 (1st Dept. 2013).

The core indicator of reliability and the basis of many hearsay exceptions is whether the declarant would be unlikely to fabricate. Here, that consisted of a lieutenant reporting a subordinate police officer for a witnessed instance of excessive force against a noncompliant prisoner. There was no suggestion that Person A had any animus toward Respondent, or even that they knew each other very much. Person A had just come onto the scene and had not accused Respondent of any other misconduct. In his CCRB statement, he seemed most upset that Respondent had acted that way for no reason, even though Hatfield was not compliant and did in fact have a warrant. He rebuked Respondent, but in an avuncular manner. The lieutenant appeared to be making the IAB referral out of a sense of duty and not because he wanted Respondent to be penalized.

Person A's statement corroborated various parts of the accounts of both Respondent and Kalaj, and Hatfield, in several important ways. Hearsay is especially admissible in administrative proceedings if there is corroboration by other evidence, testimonial or otherwise. Cf. *Case No. 74762/99*, p. 23 (Mar. 23, 2002), confirmed sub nom. Matter of Pulci v. Kelly, 2 A.D.3d 124 (1st Dept. 2003) (substantial evidence that officer struck his wife and daughter consisted of testimony of two responding police officers and transcript of wife's interview); Grossman, 217 A.D.2d at 626 (memorandum of judge concerning court attendant's dozing off during proceedings was corroborated by other evidence).

Person A agreed that Hatfield had a warrant, even stating that he confirmed the information about the warrant by checking the computer himself. He agreed that Respondent brought Hatfield into the police vehicle through the passenger side door. His accuracy on these details demonstrated his accurate recollection of the facts. There is no basis for counsel's

contention that Person A could not have seen Respondent striking Hatfield in the back seat (Tr. 133, summation). This is true whether Respondent got in on the passenger side as Hatfield and Respondent testified, or whether Respondent placed Hatfield in the vehicle from the passenger side and went around and got in from the driver side, as Person A testified.

The most important corroboration consisted of Person A's statement about Hatfield spitting toward if not upon Respondent. According to Person A, Respondent said something back about spitting, or specifically about spitting on him, and then punched Hatfield in the head three to four times. Whether Hatfield actually spit on or at Respondent was immaterial. What matters is that Respondent believed Hatfield spit on or at him. This provided motive for Respondent to strike Hatfield in retaliation. Counsel contended on summation that Person A fabricated his account because he saw Hatfield bleeding and was worried he would get in trouble (Tr. 133). This argument does not explain, however, how or why Person A would have fabricated the specific detail of Respondent being upset about Hatfield's spitting.

In sum, Person A's statement was more credible than Respondent's denial of misconduct, especially where Respondent was an interested witness and had an undisputed motive to engage in the charged act. Accordingly, he is found Guilty.

PENAL TY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 6, 2011. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The CCRB requested a penalty consisting of the forfeiture of 20 vacation days. The prosecutor's argument that this was justified by Respondent's multiple strikes against a

handcuffed and defenseless prisoner, however, did not explain why this case should receive a harsher penalty than other similar cases. See *Case No. 2014-12487* (Sept. 10, 2015) (5-year police officer with no prior disciplinary record forfeited 15 vacation days for punching prisoner without sufficient legal authority; the prisoner was handcuffed and lying flat in the back of a police vehicle when officer punched him, allegedly to maintain control because the prisoner was kicking his legs, but officer nevertheless punched him with such force that he broke his jaw in two places); *Case No. 2013-11030* (May 28, 2014) (9-year officer with no record received 10 days as penalty for using excessive force against a person by punching and kicking the individual, and for lifting and twisting the person's handcuffs, causing pain, without police necessity); *Case No. 2012-8631* (July 30, 2013) (8-year officer with no record forfeited 12 days for punching a handcuffed suspect in the face); *Case No. 75124/99*, p. 14 (Jan. 8, 2001) (15-year sergeant with no record and excellent performance forfeited 10 days for using pepper spray on handcuffed civilian inside prisoner van).

Respondent has an otherwise positive work history and Hatfield's injuries consisted at most of scratches behind the ear. The strikes against Hatfield, however, were gratuitous and untethered to any legitimate police action. The arrest already had been made, and Hatfield was handcuffed and in the back seat of the police vehicle. Accordingly, the Court recommends that Respondent receive a penalty of 15 vacation days.

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED

FEB 16 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

From: Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ROBERT MICELI
TAX REGISTRY NO. 950886
DISCIPLINARY CASE NO. 2014-12476

Respondent was appointed to the Department on July 6, 2011. His last three annual evaluations were a 4.5 overall rating of "Extremely Competent/Highly Competent" in 2014, a 3.5 rating of "Highly Competent/Competent" in 2013 and a 3.0 rating of "Competent" in 2012. He has no medals.

Respondent has no prior formal disciplinary history. He was placed on Level 1 Force Monitoring on August 16, 2013, for having three or more CCRB complaints in one year. That monitoring remains ongoing.

[redacted]

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials